

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

BOB SHANER,)	
	Plaintiff,)	
)	C.A. No. 1:17-cv-260
)	
v.)	
)	
MS. BROWN,)	
)	
	Defendant.)	

MEMORANDUM ORDER

This prisoner civil rights action was received by the Clerk of Court on October 2, 2017, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. The magistrate judge's report and recommendation, issued on July 13, 2018 recommended that Defendant's motion to dismiss (Dkt. 12) be granted and that this case be dismissed. Service was made on Plaintiff by mail at SCI Albion, where he is incarcerated, and on Defendant. No objections were filed.

The essence of the Plaintiff's claims is that he was deprived of new and needed prescription eyeglasses at the state prison where he is confined. The records filed in this case seem to reveal that an order was placed, then stalled due to a flaw in the prison's ordering system, and then the whole process never came to fruition over a very long time as to new eyeglasses due to the fact that the Plaintiff had a very substantial negative balance in his prison

account from which he would be required to pay for the eyeglasses. There is seemingly also a dispute as to whether he was provided with "loaner" eyeglasses while his order was pending, and further it appears that the individual Defendant he sued could not even be personally liable if the Plaintiff could demonstrate a right to relief as to his not getting eyeglasses at all, since it appears to be uncontradicted that she was a phlebotomist who worked in the health unit and therefore even under the Plaintiff's recitation of the facts, she had a very limited ability to affect when and whether he got new glasses or on what terms.

The Plaintiff asserts his claims under the Fourth, Eighth and Fourteenth Amendments, and the Report and Recommendation ("R&R") squarely and correctly addressed the claims he asserts under the Fourth and Fourteenth Amendments, and the R&R is adopted in full by this Court as to its recommendation that those claims be dismissed with prejudice, as they are without a basis in law, and the flaws in them cannot be corrected by amendment. The Eighth Amendment claim is at this juncture another matter. While the bar is high for this or any plaintiff to surmount- -"deliberate indifference to a serious medical need"- - the Court cannot conclude that the Plaintiff's claim that he was deprived of medically-necessary eyeglasses because of his negative prison account balance may not state a claim for relief, depending on the factual issue with the nature of his eyesight and its limitations, the factual situation regarding his request for new glasses, when and on what terms he actually received them, and whether his negative account balance was the motivating factor in his not receiving them. Based on what the Plaintiff has asserted so far, the Court cannot conclude that any amendment to plead sufficient facts showing an Eighth Amendment violation by a proper, specific, personally liable Defendant is out of the question, so that claim will be dismissed without prejudice but with leave to amend. *See*

Wagner v. City of St. Louis Dept. of Public Safety, No 12-cv-1901, 2014 WL 3529678 (E.D. Mo. July 16, 2014); *Kemppainen v. Aransas Cty. Detention Ctr.*, No. 08-194, 2010 WL 4918958 (S.D. Tx. Nov. 23, 2010).

After de novo review of the petition and documents in the case, together with the R&R, the following Order is entered:

AND NOW, this 31st day of July, 2018;

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (Dkt. 12) is GRANTED as follows. All claims other than the Eighth Amendment claim are dismissed with prejudice. As to the Eighth Amendment claim, such claim is dismissed without prejudice, and with leave to amend. Any amended complaint, asserting only an Eighth Amendment claim as against a proper defendant, shall be filed on or before August 31, 2018. Should an amended complaint not be filed by such date, the dismissal without prejudice under this Order shall convert to a dismissal with prejudice without further Order or notice. The report and recommendation of Magistrate Judge Baxter, issued July 13, 2018, is adopted as the Opinion of the Court, except to the extent modified by this Order.



MARK R. HORNAK
United States District Judge

cc: Susan Paradise Baxter
U.S. Magistrate Judge

all parties of record _____